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Mr. P. Joseph Grindstaff, Executive Officer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Subject: Comments on the Fifth Draft of the Delta Plan

Dear Mr. Grindstaff:

The City supports the co-equal goals of restoring the ecological health of the Delta and creating a reliable water supply for the State and we appreciate the opportunity to offer comments of the Fifth Draft of the Delta Plan (Plan). We would like to commend the Delta Stewardship Council (DSC) and DSC Staff for the hard work in developing the Plan. Substantial improvements have been made in the various drafts and we appreciate the DSC and Staff engagement in this process. However, the City still has some significant concerns relating to Water Supply, Local Land Use Authority and Fees. We offer the following comments to address these concerns:

General Comments

1. The Delta Plan should provide financing mechanisms that are fair and equitable to stakeholders

The City supports the beneficiary pays principle identified on pages 205 through 206, provided that the process for determining who the beneficiaries are, and the extent of their benefit, is transparent and thoughtful, and provides all interested parties an opportunity to participate. Similarly, while the principle of “stressor pays” appears equitable at a conceptual level, the Plan lacks adequate information on the scientific basis that would be used to develop “stressor” charges, or the process that would ensure the development of such charges are fairly based on actual impacts to the Delta. In this regard, the last “Guiding Principle” states that “To the extent possible, user fees should be



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based on the amount of water used, or for stressors, the volume of contaminants discharged.” This approach appears to be too simplistic, and does not recognize more detailed factors such as where and when water is diverted and under what water right authority, how much returns to the system after use, what are the contaminants and when are they discharged, to what degree do such contaminants impact the Delta, etc.. To address these concerns, any beneficiary and/or stressor charges must be based on, and proportional to, actual proven benefits or impacts.

Another concern is the Plan’s provision providing no credit against potential Delta charges for “site-specific” expenditures (see page 206, penultimate Guiding Principle). The City sees no reason why expenditures incurred upstream of the Delta that provide actual benefits to the Delta should be disallowed from eligibility for such a credit simply because they can be classified as “site-specific.”

Finally, the Plan does not include any discussion of Proposition 26, which imposes significant new limitations on charges that can be imposed by the State without constituting a “tax”. These limitations could significantly affect the extent to which beneficiary and/or stressor charges can be imposed.

2. **The Plan’s co-equal goals must include water supply reliability for the entire State, not just those who import water.** The Plan indicates that the Bay Delta Conservation Plan (BDCP) will be incorporated into the Delta Plan, and the “Problem Statement” set forth on page 87 of the Plan describes the goal of the BDCP “to promote the recovery of endangered, threatened, and sensitive species and their habitats in the Delta in a way that also improves reliability of water deliveries exported from the Delta watershed.” The City is concerned that improved water supply reliability for areas that receive water exported through the Delta may be achieved at the expense of water supply reliability for areas that do not import water, such as the Sacramento region. The Plan must be developed and implemented in a way that prevents this from occurring and promotes water supply reliability for the entire State.
3. **The Plan should respect the rights of existing water right holders.** Recommendation WR R5 states that proponents requesting a new point of diversion, place of use or purpose of use for water diverted from the Delta watershed should be required to demonstrate that they have evaluated and implemented all other feasible water supply alternatives. It is unclear what “feasible” means in this context, and how this is intended to be applied to existing senior water right holders and/or new water right applicants within the area of origin in a manner that is consistent with the water right priority doctrines, as mandated by State law. The City and other regional water purveyors have made significant ongoing investments in the water supply facilities and infrastructure necessary to develop their senior water rights, and these rights must be respected. Moreover, it is unreasonable to establish a standard that is far more stringent than what CEQA requires, since CEQA allows agencies to reject feasible alternatives based on findings of overriding considerations, such as cost or other factors.

With respect to diversions upstream of the Delta boundary, the City also requests clarification that such upstream diversions are not “covered actions”, even if the upstream diversions could have impacts within the Delta boundary. This has implications throughout the Plan where the applicability of its terms depends on whether or not something is a “covered action.”

4. **Some confusion still exists in the Governance chapter of the Plan with respect to covered actions.** The Plan should avoid creating “covered actions” that unnecessarily burden routine development activities inside a City. While the Delta Plan has become clearer with subsequent drafts, some ambiguities and questions still remain. We offer comments in Attachment 1 of this letter that may help the DSC in removing the ambiguity.

Our review of the Plan identified a number of additional concerns, which are presented in Attachment 2 of this letter.

In closing, we once again thank the DSC for the opportunity to make comments. If you have questions or require additional clarification, please contact Jim Peifer at (916) 808-1416.

Sincerely,



Dave Brent

Interim Director of Utilities

Attachments (2)

Attachment 1 Governance (Chapter 3) Comments

1. Agencies are required to file a certificate of consistency for all covered actions. Any party may challenge the self-certification that a covered action is consistent with the Delta Plan. However, the procedures do not appear to require a certificate of exemption in which an agency declares that a proposed action is not a covered action. The determination of whether the action is a covered action subject to consistency review with the Delta Plan could be addressed in the CEQA review process. This could also provide the opportunity for modifications to be made to a project to avoid “significantly impacting” achievement of the co-equal goals, and thereby taking the project out of the consistency review requirement altogether.
 - a. What is the process for a 3rd party to challenge an agency’s self-determination that an action is not a covered action?
 - b. Is there a way to get assurance from the DSC that an action is indeed not a covered action?
2. It is unclear how a covered action (which is defined by Water Code §85057.5(a) as an action that will have a significant impact on the achievement of the co-equal goals) can also be consistent with the co-equal goals and the Plan policies. It is especially ambiguous how in Policy G P1: “full consistency with *all* relevant policies may not be feasible, but on whole, the covered action can be consistent with the co-equal goals and inherent objectives”; this appears to be a significant judgment call for which little guidance is provided in the Plan.
3. The terms “exemption” and “exclusion” (statutory or expressly excluded by the Plan) appear to be used somewhat interchangeably and without supporting explanations – giving rise to further ambiguity.
 - a. Certain actions are statutorily exempted by the Delta Reform Act of 2009 (see Water Code §85057.5(b)). However, the statute does not explain the purpose of stating that the listed actions are not “covered actions.” It could be that the Legislature determined that the listed actions are not, by their nature, likely to have the four characteristics of a “covered action,” or it could be that the Legislature determined to grant an exemption for policy reasons, regardless of the significance of the impact the actions may have on the Delta Plan’s co-equal goals. Not knowing the reasoning behind the list of actions not covered by the Act casts uncertainty over what is intended to be included as a “covered action.”
 - b. In Chapter 3 under *Administrative Exemptions* the Plan lists three categories of actions that the DSC has determined are not covered actions “because they will not have a significant impact” under Water Code §85057.5(a)(4), meaning because they do not fall within the definition of “covered action.” Two of the three actions listed are taken from the list of statutory exemptions under CEQA, these being ministerial projects and “emergency” projects.

If you have questions or require additional clarification regarding the governance issues, please contact Scot Mende at (916) 808-4756.

Attachment 2 Other Comments

Chapter 4 – A More Reliable Water Supply for California

- P. 81-82: The discussion of article X, section 2 and the Problem Statement does not seem to recognize that determining what is or is not a waste and unreasonable use of water is a fact-based determination that must consider the specific circumstances of any particular situation, and that one should be careful not to make broad brush judgments as to what is or is not a wasteful and unreasonable use. Factors such as climate, topography, return flow and cost/benefit should all be considered before attempting to determine whether or not a particular use of water is violative of article X, section 2.
- P. 82-84: WR P1 requires water suppliers to add a new Water Reliability Element in their UWMP not later than December 31, 2015, and establishes consequences if this is not done. We offer two comments: (1) The addition of mandatory elements to the UWMP should be done by legislative amendment of the UWMP Act, rather than through the adoption of administrative policy; (2) The new Element requires a water supplier to show how it is sustaining and improving regional self-reliance and reducing reliance on the Delta. As the Sacramento region's water supply consists of water diverted from the Sacramento and American Rivers and groundwater, we are assuming that our development of this water supply in an environmentally responsible manner would be considered "sustaining and improving regional self-reliance," but this should be clarified in the Plan.

WR P1 also requires an evaluation of the regional water balance and a requirement to bring the region into balance through the Integrated Regional Water Management Plan. It is not reasonable or feasible to require one water supplier to perform and be held responsible for the outcome of this regional water balance.

Regarding the language relating to conservation-oriented rate structures, this would benefit by a recognition that any such rate structure must comply with Proposition 218 and any other applicable authorities, particularly given the recent Court of Appeal decision in *City of Palmdale v. Palmdale Water District*. Also, given that State law currently allows, but does not require conservation-pricing (provided there is compliance with Proposition 218), it seems that if the intent ultimately is to mandate conservation-based pricing, then this should be addressed by the legislature rather than through the adoption of administrative policy. Any such mandate also should be mindful not to institute a "one size fits all" approach.

- P. 98: Two of the “Outcome Performance Measures” are (1) progress toward increasing local and regional water supplies, and (2) progress in each region in reducing actual or projected reliance on Delta water supplies. For the Sacramento region, would increased surface water diversions be considered as in furtherance of (1), or in contravention of (2)? As noted above, Sacramento’s “local and regional water supplies” consist of diversions from the Sacramento and American Rivers upstream of the Delta boundary, and groundwater.

Chapter 6 – Improve Water Quality to Protect Human Health and the Environment

- P. 149: Recommendation WQ R8 directs the Central Valley Regional Water Quality Control Board to “require responsible entities that discharge wastewater treatment plant effluent or urban runoff to Delta waters to evaluate whether all or a portion of the discharge can be recycled, otherwise used, or treated in order to reduce contaminant loads to the Delta by January 1, 2014.”

This could lead to costly new WDR/NPDES permit requirements with no commensurate benefit. The City supports the Maximum Extent Practicable (MEP) approach to stormwater management, comprised of iterative implementation of cost-effective, reasonable and practical Best Management Practices. The Sacramento Municipal Separate Storm Sewer Systems (MS4s) are required by the current NPDES Permit to develop standards to implement Low Impact Development strategies which aim to reduce urban runoff associated with development. Reducing runoff volume is an effective way to reduce contaminant loads from urban runoff sources. There are many initiatives and programs (stormwater program, water conservation, etc.) that are currently in progress for reducing urban runoff volume. The feasibility and cost-effectiveness of the recycling and treatment of urban runoff should be evaluated prior to mandating any such requirements in regulatory programs.

The City recommends revising the language for the WQ R8 as follows: “The Central Valley Regional Water Quality Control Board, consistent with existing Water Quality Control Plan policies and water rights law, should require responsible entities that discharge wastewater treatment plant effluent or urban runoff to Delta waters to evaluate, by January 1, 2014, the feasibility of whether all or a portion of the discharge can be recycled, otherwise used, or treated as an alternative approach ~~in order~~ to reduce contaminant loads to the Delta ~~by January 1, 2014.~~”

- Recommendation WQ R9: In this recommendation, the State Water Board and Regional Water Board are directed to “conduct or require special studies of pollutants including selected emerging contaminants and causes of toxicity in Delta waters and sediments by January 1, 2014”.

Special studies have been required in every MS4 permit in the State for various pollutants of concern and for BMP effectiveness evaluation. The State Water Board and Regional Water Board need to streamline regulatory requirements to reduce redundancy and improve program efficiency. These special studies should be conducted with regional and collaborated efforts led by the State or Regional Board. Also any timeline should be realistic.

The City recommends revising the language for the WQ R9 as follows: “The State Water Resources Control Board and/or Regional Water Quality Control Boards should ~~conduct or require~~ be the lead agency for developing a work plan and conducting regional special studies of pollutants including selected emerging contaminants and causes of toxicity in Delta waters and sediments by January 1, 2014.”

Chapter 9 – Finance Plan Framework to Support the Coequal Goals

- P. 211: The discussion of user fees states that the Legislature should authorize the DSC to develop and apply user fees. It is unclear whether this is recommending that the DSC be given blanket authority to adopt and impose fees, so that there would be no requirement for the Legislature to actually adopt fees after they are developed, but before the fees can take effect. The City strongly believes that no fees should take effect until such fees, as well as the fee amounts, are approved by the Legislature.

This section of the Plan also recommends that the Legislature adopt legislative amendments to allow local agencies to assess fees under Proposition 218. It bears noting that the Legislature cannot amend Proposition 218, nor can it amend Proposition 26 adopted by California voters in 2010. As previously noted, Proposition 26 imposes significant new limitations on charges that can be imposed by the State without constituting a “tax”, and any proposed user fees should be considered with these limitations in mind.

- P. 212: The proposed Public Goods Charge faces the same requirements under Proposition 26.